Before the
Federal Communications Commission
Washington, DC 20554

In re	)	
	)	
Review of the Prime Time	)	
Access Rule, Section 73.658(k) of the	)	MM Docket No. 94-123
Commission's Rules	)	

To: The Commission

COMMENTS
THE MEDIA INSTITUTE

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March 6, 1995

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EXECUTIVE SUMMARY

The Media Institute, a nonprofit research foundation committed to safeguarding free speech and competition in the delivery of telecommunications services, has weighed the current points of dispute over the prime-time access rule.

The access rule clearly continues to raise questions of conflict with the First Amendment ban on abridging free speech. The rule does amount to a government imposition on how a selected group of TV publishers may communicate with its TV audiences.

The constitutional issue notwithstanding, there is considerable evidence that the rule has been part of a TV environment that has been felicitous to the growth of independent stations (most of them UHF), to an increase in more non-network programming, and to the proliferation of TV networks -- in short, to a more robust and competitive industry.

Therefore, if the Commission's decision is to eliminate or significantly modify the rule, The Media Institute recommends a significant transition mechanism and offers suggestions to lessen the risk to the TV marketplace.

HOW THE MEDIA INSTITUTE VIEWS PRIME-TIME RULE

The Media Institute, in the course of keeping watch on challenges to the First Amendment and to any slackening of the public commitment to advancing competition in the delivery of telecommunications services, has probed original intent, reviewed the 25-year history, and weighed the current points of dispute over the prime-time access rule.

The rule clearly continues to conflict with the constitutional ban on abridging free speech. On the other hand, there are now more operating UHF stations, more independents, more non-network programming, more TV networks here and on the way. If not exactly proof that the rule is at the root, those developments at the least demonstrate that the prime-time access rule has been part of a felicitous environment for the growth of competition. The Media Institute, a nonprofit research foundation, believes that there is a substantial public stake in how this reexamination of the principal features of the dispute is resolved.

If the Commission decides to eliminate the prime-time access rule, it should do so only for First Amendment reasons; the prime-time rule does, after all, amount to a government restraint on how a targeted group of TV publishers may communicate with its TV audience. If the Commission rejects this First Amendment analysis, there is substantial evidence for the proposition that, as a practical matter, the rule has worked and that keeping some version on the books can be justified on pragmatic grounds.

OVERVIEW OF PRIME-TIME RULE

The access rule clears network and off-network programming out of a prime-time hour of network affiliates in the top-50 TV markets so that independent program producers will, as a consequence, have a market for their product in that time period. The rule, however, exempts (Section 73.658(k)(1)-(6)) a number of specified types of network program material, such as news, documentaries, children's, sports, etc.

How Prime-Time
Rule Works.

The prime time access rule has the effect of barring network affiliates in the top-50 TV markets from using network or off-network programs (reruns) during the 7-8 p.m. prime-time hour. As a result, a first-run syndicated program production business has developed to meet the requirements of those network affiliates to fill that hour. Conversely, independent stations in the top-50 markets have less interest in first-run programs. What they want -- and now have access to, arguably because the prime time rule excludes affiliate bidding -- is the familiar and popular off-network fare that draws audiences with built-in loyalties. In brief, the prime-time rule may be said to have worked because it provided opportunity for independent stations to insert off-network programming in the access period in order to attract new audiences, and it encouraged first-run syndicators who need exclusive access to network affiliates and their guaranteed audiences.

Networks and Affiliates Are Pitted Against
Twice as Many Independents,
Most of Which Are UHF.

With the launching of this rulemaking, the Commission is saying that its proposals to modify or eliminate the prime-time access rule are meant to "ease the regulatory burden" on 167 network affiliates in the top-50 TV markets. (*Notice*, App. B, Initial Regulatory Flexibility Analysis). There are some 480 commercial TV stations in those markets. (*Notice*, para. 16). This reexamination of the prime-time rule, then, unavoidably demands that the Commission sort out the conflicting claims of the networks and their affiliates against about twice as many independents. And most of those independents are UHF stations. (*Notice*, para. 36). The latter circumstance alone undoubtedly obliges the Commission to proceed cautiously, lest it be seen as upsetting the competitive environment it has sought to create for UHF.

THE FIRST AMENDMENT

A rule, however workable and market-friendly, may not be sustainable if it is constitutionally infirm. On reflection, The Media Institute cannot clear the prime-time rule of First Amendment skepticism and finds that objection to the rule for that reason has been rightfully entered.

The constitutionality of the prime-time rule seems clearly implicated because the rule does amount to a government imposition on a particular group of TV publishers. The Media Institute is not here entering the continuing debate over whether technological developments have eliminated spectrum scarcity as a justification for broadcast content regulation. *See, e.g., Syracuse Peace Council,* 2 FCC Rcd 5043 (1987), *recon. denied,* 3 FCC Rcd 2035 (1988), *affirmed sub nom., Syracuse Peace Council v. FCC,* 867 F. 2d 654 (D.C. Cir. 1989), *cert. denied,* 493 U.S. 1019 (1990). The Institute is of the view that, *Mt. Mansfield Television, Inc. v. FCC,* 442 F. 2d 470 (2d Cir. 1971) notwithstanding, there remain obvious problems with the constitutionality of the prime-time rule.

Prime-Time Rule
Is Content-Based.

The rule, as noted earlier, excepts certain programs from the prime-time restriction. Thus, programs that deal with news, public affairs, documentary matters, children's requirements, live sports, and feature films are acceptable in affiliate prime-time no matter their source. And these program categories are meant to be identified by definitions supplied in Note 2 in the prime-time rule.

The definitions inescapably turn on content because they aim at specific speech and entail subjective judgments about the substance of televised messages. For example:

> . . . the term *programs designed for children* means programs primarily designed for children aged 2 through 12.

Or, for documentaries:

> The term *documentary programs* means programs which are nonfictional and educational or informational, but not including programs where the information is used as part of a contest among participants in the program, and not including programs relating to the visual entertainment arts (stage, motion pictures or television) where more than 50% of the program is devoted to the presentation of entertainment material itself.

Without extending this recitation, the rule, which would in any event appear to be questionable because it lacks objectively measurable preciseness, undoubtedly is also content-based and presumptively invalid under *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2548-49 (1992).

Prime-Time Rule Favors One Class of Speaker Over Another.

The prime-time access rule is explicitly and precisely crafted to favor one class of speakers over another. In order to create access for independent producers during the cleared-out hour of affiliate prime time, the rule denies

affiliates access to their networks and limits the First Amendment freedom of affiliates to choose the televised messages they wish to communicate.

In a 1976 decision, the U.S. Supreme Court in *Buckley v. Valeo,* 424 U.S. 1, 48-9, held that:

> . . . the concept that government may restrict speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . .

Other precedent establishes that a rule that prefers some speakers over others merits the strictest constitutional scrutiny, and that direct restriction on protected First Amendment activity will be subjected to "exacting First Amendment scrutiny" and, therefore, be considered presumptively invalid. *Riley v. National Federation,* 487 U.S. 781, 789 (1988).

Commission Itself Rethinking Constitutional Question.

With *Mt. Mansfield Television* still in its sights, the Commission seems nevertheless alert to the possibility that newly surfaced considerations may affect ". . . the constitutional implications of any proposed alternative to the present rule." Thus, the *Notice,* para. 58, extends this invitation:

> Parties may also wish to address whether and to what extent new and developing technologies have affected the constitutional analysis applicable to regulations of this nature, including whether, in fact, broadcast and non-broadcast program outlets are constitutionally indistinguishable. . . .

PRIME TIME ACCESS:
PRACTICAL EFFECTS

This reexamination of the prime-time access rule is a form of experimenting with an intricate marketplace for television programs. The current broadcast TV environment, already adjusting to repeal of the financial interest and syndication rules, could face significant disequilibrium from an immediate redrawing of the rules for marketing TV programs. That alone suggests the need for caution. Importantly, too, repudiation of the rule would arguably undermine the Commission's efforts to stimulate UHF development, spanning some 40 years.

Expanded TV Availabilities and Dubious Quality
of Newly Developed First-Run Programs
Do Not Necessarily Impair Serviceability of Rule.

The impetus to revisit prime-time access comes for the most part from private parties who stand to gain from a repudiation of the rule. There is argument that the rule is a relic, outdated by the considerable intervening changes in the TV landscape. There is, however, surprisingly little disagreement from that quarter with the proposition that the rule has worked to produce a renewed body of independent TV stations, although there is insistent denial of the worth of the new programming that the rule has stimulated.

It is conventional for those who would terminate the rule to point to, and rely heavily on, the growth of cable TV and the consequent wealth of channel choice, as the unanswerable proof of the changed TV environment that (it is argued) has obsoleted the necessity for opening access to broadcast prime time. But it can also be argued that 40% of TV households are not wired to cable; indeed, the needs of that universe were said to justify must-carry and the other impositions of the 1992 Cable Act.

In response to the urgings that there is something less than memorable about the new first-run programs that have been spawned by opening up the prime-time hour, it is the sense of The Media Institute that the Commission will want to avoid getting into the business of judging content value, particularly when it can rely on that chapter having been put to rest when the rule was adopted. Thus, in a Concurring Statement to the *Report and Order* in Docket No. 12782, 23 FCC 2d 382 (1970), Commissioner Cox offered this blunt assessment (emphasis added) at pp. 418-19:

> . . . **I have no illusions that, in the process, we are going to get better programing.** I recognize that the economic motives of the local affiliates are the same as those of the networks. I simply hope that we will get somewhat more varied programing, with more people involved in the creative process, and without forcing everything through the network funnel.
>
> ***
>
> The Chairman then discusses whether the new rule will result in diversity of programing - though I have already pointed out that we do not claim that it will, but only that it will open the market to more producers. It would be fine if some of those thus given access to the most lucrative time on television would immediately generate

> significantly different programing. **But if these new producers simply turn out more of the same, the public will at least be getting "more games, more light entertainment along proven formulas, more 'emcee' talk shows" from more different sources and without everything having been homogenized to fit the tastes of only three small groups of people.** If this results in the development of a healthy syndication industry, it seems to me that we will have somewhat increased the chances that new program concepts will be attempted. Certainly continuation of the present system would guarantee more of the same, so we are losing nothing by making that effort to increase competition.

Repudiation of Prime-Time Rule Is Inconsistent with Treatment of UHF.

The nourishing of UHF was part of the design (23 FCC 2d 382, 394) of the prime-time rule, it will be contended, and that the Commission can claim the revival of UHF as a consequent and noticeable phenomenon in the new TV order. UHF stations are not yet, however, the equivalent of stations in the VHF band. Until that balance is achieved, perhaps through the saturation of cable subscribership, the Commission, by curtailing the prime-time benefits that accrue to independent stations ("most are UHF-based," *Notice*, para. 36), would conceivably be straying from its long-standing and long-range pledge to the technology.

The history of the Commission's involvement with UHF has been a long and persevering commitment. Simply, UHF is at a technological disadvantage against VHF, and the more than 40-year long-haul by the FCC to

cultivate UHF has been the legacy of intermixture in the 1952 television allocation plan. Looking back, it is of historical note that the Commission was perceived as having yielded to intermixture in order to come to terms with the weighty influence of the 108 holders of VHF authorizations that had been earlier granted. To the credit of the institution, however, succeeding Commissions have worked hard to recover from that early confusion and have persistently subscribed to standing up for and boosting UHF. Thus, history is strewn with such examples as proposals to deintermix selected markets, later with a successful call for an all-channel receiver -- in short, a long array of expedients that ranged from requiring click UHF tuning in TV sets to extending, in the 1972 *Cable Television Report and Order*, priority in cable carriage.

And the fixity of purpose, in the view of The Media Institute, has been straightforward and resolute. Thus, in 1953 the Commission adopted a five-station limit on the ownership of TV stations which, within a year, was raised to seven to allow for the acquisition of two extra UHF stations. The action was later (1984) described (*Report and Order* in Gen. Docket No. 83-1009, 100 FCC 2d 17, 22 and fn. 15) as follows:

> This action was taken to encourage the development of UHF stations, which were then just becoming available in the marketplace.

In 1984, on reconsideration of the ownership limits (*Memorandum Opinion and Order* in Gen. Docket No. 83-1009, 100 FCC 2d 74, 92), the Commission asserted that:

> . . . UHF incentives in our multiple ownership rules have become an integral part of our regulatory framework.

More recently, **in 1989,** the Commission waived the dual network and prime-time access rules in favor of the Home Shopping Network. The *Memorandum Opinion and Order,* 4 FCC Rcd 2422, declared at 2425 that:

> Such a waiver, by facilitating the growth of a program service alternative to those supplied by the traditional networks and through facilitating the creation of new UHF television stations, will assist in the accomplishment of major goals of the rule.

For the Commission to now give up on UHF by throwing out the prime-time rule would, arguably, be perceived as a reversal of its long-term efforts to stimulate UHF development.

As a Practical Matter, the Rule Appears To Have Worked.

It will be vigorously urged that the prime-time access rule has been a bull's-eye success story, that it has faithfully produced the results for which it was designed. Over the course of decades-long deliberations (23 FCC 2d 382 (1970), the Chairman's Dissenting Statement placing the origin of the inquiry more than a decade earlier, and 50 FCC 2d 829(1975), when the rule was firmed up) the Commission announced at various times that providing for

prime-time access had to do with diminishing the influence of the three national TV networks, with inducing the development of new first-run programming, and with encouraging the growth of independent TV stations and new TV networks. In assessing whether the targets have been approached, evidence is accumulating that the rule can creditably be viewed as something of an effective accomplishment. At least, that appears to be the inference that can be drawn from the evidence being supplied by some of the most urgent advocates for recalling or modifying the rule.

As to network dominance, The Coalition To Enhance Diversity, in *Reply Comments* of July 14, 1994 in MMB File No 870622A, assures (p. 2) that:

> . . . the ability of ABC, CBS, and NBC to capture prime-time audiences has eroded. . . .

Channel 41, Inc., in a *Petition for Rulemaking*, April 24, 1987, agrees (p. 18):

> A new national network is forming, (fn. omitted) and erosion persists in the three major networks' dominance. . .

(To the same effect, the subject *Notice*, para. 41: "...the major networks are not as dominant as they were 24 years ago.")

On growth in new program sources, the Coalition, in the same *Reply Comments*, explains (p. 2) that:

> . . . the first-run syndication business is flourishing.

Channel 41, in its rulemaking petition, notes (p. 13) that:

> Eleven first-run syndication programs are broadcast during non-network prime time -- an increase of more than 500 percent.

Later (p. 15), Channel 41 informs that:

> First-run syndicators are among the most notable beneficiaries of. . . growth. They are producing almost double the number of first-run programs as when the Commission promulgated the "off-network" ban in 1970 [fn. omitted]. . . . Seven years after enactment of the "off-network" ban, the number of first-run syndication programs had soared from 45 to 73. [fn. omitted] By this year, 82 different first-run programs were available for next fall.[fn. omitted]

Also favoring the rule is the expectation that the number of national TV networks is doubling, a consequence, it may rationally be argued, of the increased availabilities of independent TV stations with which to affiliate. The above-identified Channel 41 petition noted (p. 14) that the Commission in 1970 had deplored the circumstance that only fourteen of the top-50 TV markets had one or more independent VHF stations. But Channel 41 in 1987 made a count of independent stations in the large markets, and found that the number of such VHF independents had conservatively more than doubled (conservative, because the total did not include "stations licensed but not on the air"). Furthermore, Channel 41 discloses, (*Id.*), "...enormous growth has occurred. . . in UHF independent stations . . . Their numbers also more than doubled from 1970 to the present." These conclusions as to the changes in the TV landscape are verified by the market-by-market survey results that are submitted as an Attachment to the Channel 41 filing.

Are these considerable advances in broadcast TV directly attributable to the prime-time access engine? Perhaps a conclusive connection cannot be unimpeachably demonstrated. But, by the same measure, the assessment of the prime-time rule as a "Notable Success Story in the Annals of Regulation" (June 14, 1994, *Comments* of Association of Independent Television Stations in MMB File No. 920117A, p. 8) cannot, in light of the emergence of independent and UHF TV stations and of new TV networks, be dismissed as mere talk.

Has Rule Outlived
Its Useful Life?

There is no clear proof that the prime-time rule has outlived its usefulness, and should, therefore, be closed out. The Association of Independent Television Stations argues that tampering with the rule would be "premature" and contends that, until the dust settles, the TV market is and will be, as a consequence of imminent changes in the financial interest and syndication rules, in the kind of flux that responsibly should discourage the introduction of additional confusion. The networks and network affiliates are, expectably, for elimination of the prime-time rule or, at least, for a dropping of the off-network program embargo. The regular public interest advocates are to be found kibitzing on both sides of the question.

IF DECISION IS TO TRIM ACCESS, TRANSITION MECHANISM IS INDICATED

If it is decided to discard or substantially modify prime-time access, the Commission seems resigned to supplying a transition mechanism, in the interest of avoiding disruption and of allowing for an easing into new modes of creating and marketing TV programs. Thus, in the *Notice*, para. 61:

> If . . . the Commission chooses to modify or eliminate the rule, we must then determine when to do so and whether we should adopt transition measures.

The Media Institute is concerned that an early effective date, on top of the new wrinkles that will flow from the scheduled phasing-out of fin/syn, has the potential to overburden the delicate balances that are part of the TV program marketplace. The Institute has, therefore, been urging a cautious approach to stirring up the prime-time environment. It is also recognized that the nature of a transition mechanism can be dictated by the rationale accepted by the Commission to support its action.

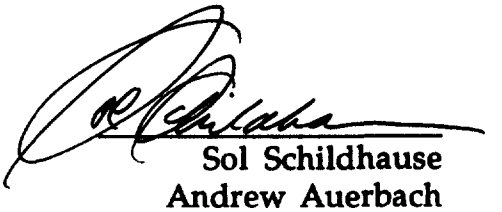
For example, if the Commission were to now deny the constitutional legality of prime-time access, there would be an understandable compulsion to make the action effective immediately on the reasoning that instant invalidity is the consequence of identifying a regulation as illegitimate. And the Commission, itself, has opened up the "possibility" that the action be effective "immediately after such a decision is made." (*Notice*, para. 61).

The dilemma is heightened by the circumstance that other regulatory changes impend that can swamp any premature revision of prime-time access. In its October 5, 1994 letter to the Commission (copy herewith as **ATTACHMENT**), The Media Institute cautioned that changes in the access rule figured to alter the rhythms of the business of creating and distributing TV program material, and that hasty action could turn out to be wasteful and possibly harmful. At the very least, The Institute continues to see compelling reason to put off the decisional process on prime-time access until results are available from the aftermath of the scheduled expiration of the fin/syn rules.

Turning to the prospect that the Commission may, as a matter of policy, dismantle the rule, The Media Institute observes that, one way or another, the termination or significant modification of prime-time access will be reflected in significant changes in the TV program marketplace. And whether those changes will be of public benefit cannot, it is believed, be anticipated. To allow, then, for a period that will give the workings of the marketplace opportunity to produce recognizable results, The Institute urges a one-step-at-a-time approach to shedding the restrictions of the rule. Among the small retreats that seem forthright, The Institute would establish a sunset date, perhaps five years ahead, to allow creators, sellers, and buyers to plan for the eventuality. It also occurs that what might be perceived as a manageable way out would be a cutting back of five markets every 18 months or so, all to allow for careful monitoring by the Commission as these 25-year old controls come undone.

In all events, The Media Institute trusts and anticipates that the Commission will tread warily, ever mindful of the First Amendment. If the Commission decides to ease the restraints of the rule, the Institute strongly urges a meaningful transition period.

Respectfully submitted,



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ATTACHMENT

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October 5, 1994

The Honorable Reed E. Hundt
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1919 M Street, NW
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Dear Chairman Hundt,

The Media Institute is sensitive to the dispute over the Prime Time Access Rule. The Institute, which among its missions counts itself a guardian of the First Amendment and an advocate of competition in the provision of telecommunications services, sees both of its worries involved in evaluating the conflicting claims of the parties lined up on each side of the disagreement. The position of the Institute is not yet arrived at, but in the process of measuring the outlook for free speech and competition, we face up to some certain truths.

For example, we are fully aware that competing economic and political self-interests are driving the suggestions for change that are predictably consonant with those interests. We know, too, that the proposals for the Commission to opt for inquiry over rule-making are probably not more complicated than small steps designed to slow the process.

Given all of that, we are moved by the sense that, as was the case with the original adoption some 25 years ago, prospective changes in the Prime Time Access Rule will again for a generation alter the rhythms of the business of creating and distributing TV program material. Given the certainty that other circumstances impend that can swamp any premature revision of the Prime Time Access Rule, The Media Institute finds itself drawn to the cautionary note struck in the September 29 letter from Congressmen Markey and Fields. Those looming influences are the near-term likelihood (a) of a revisiting of fin/syn, now scheduled for May of next year, and (b) new influences at work from ownership changes of the NBC, CBS, and ABC television networks.

It is our belief that the Prime Time Access Rules and the fin/syn rules were contemporaneously adopted as complementary components of a

regulatory scheme to counter the dominance of the three networks and to create opportunities for the development of new diversity in TV programming. The Commission has understandably given itself leeway in separately considering rule changes. But it would appear to be of little public purpose to worship fastidiousness over reality.

Simply, the two proceedings cannot be unlinked, and with May, 1995 around the corner, it may occur to you, as it has to us, that hasty action on the Prime Time Access Rule can turn out to be, at best wasteful, at worst harmful and destructive. The Media Institute is continuing to inquire and to study, and hopes to arrive at a rational position that will be the result of having dug deeper than the often-conclusory assertions of the contending interests. In this circumstance, The Institute counsels that caution is indicated, and putting off for a while the reexamination of the Prime Time Access Rule seems risk-free and wisely deliberate.

Sincerely,

Patrick D. Maines
President

cc: Commissioners:
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